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Utah Supreme Court

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IN THE UTAH SUPREME COURT

B.A.M. DEVELOPMENT, LLC, a Utah limited liability company,	:	
Respondent and Cross-Petitioner,	:	Supreme Court No. 20040365-SC (20010840CA)
-vs.-	:	
	:	Priority 15
SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	
Petitioner and Cross-Respondent.	:	

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REPLY BRIEF OF PETITIONER AND CROSS-RESPONDENT SALT LAKE COUNTY

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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No unconstitutional "taking" of private property without just compensation occurred in this case under the United States or Utah constitutions where the County's highway dedication ordinance required dedication of property pursuant to a uniform and comprehensive "legislative" transportation scheme, rather than an *ad hoc*, site-specific "adjudicative"decision. Thus, the *Dolan* "rough proportionality" test does not apply in this case.

This appeal presents a question of first impression for this court and, apparently, for any court in the United States[1]. Respondent and Cross-Petitioner BAM Development, LLC ["BAM"] essentially asserts, in its Opening Brief ["BAM Op. Brief."] that the analytical models set forth in the United States Supreme Court's *Nollan* and *Dolan* cases are "logically intertwined," are "essentially inseparable" and "must be read together." *Id.*, at 26. However, BAM offers no legal authority for this assertion.

A key problem with BAM's analysis is its emphasis on the *quantity* of the County's purported taking, as opposed to its *quality*. Stated otherwise, BAM is preoccupied with *degree* rather than *kind*. Yet it is the *kind*, or quality, of the highway right-of-way dedication – not the degree to which it impacted BAM – that distinguishes this case from others. The exaction imposed here was the result of uniform application of a highway dedication ordinance which applies to all similarly situated land developers (*i.e.*, those whose land shares a common

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[1]The County has found no reported case addressing either the application of the *Nollan* and *Dolan* tests, or the distinction between legislative and adjudicative land use exactions, in the narrow context presented here, *i.e.*, a highway right-of-way dedication imposed by ordinance on a developer whose property abuts an existing public road. Evidently, BAM has found so such cases either, inasmuch as its Opening Brief does not cite any such authority.

boundary with a highway). But BAM maintains that this analysis must be subject to the *Dolan* "individualized determination" of "rough proportionality" between the exaction imposed as a condition of development approval and the nature and degree of the impact of the development. BAM's emphasis on equivalency in *degree* between exaction and impact is misguided.

For instance, during the subdivision approval process, BAM did not object to the County's original requirement that BAM dedicate a 40-foot "half-width" right-of-way along the frontage of its land which abuts 3500 South street[2]. BAM did not protest until the County, after consultation with UDOT, increased the dedication from 40-feet to 53-feet[3]. Thus, BAM's claim on appeal, in effect, is that a required dedication for highway right-of-way of 40-feet is constitutionally permissible, but a dedication of 53-feet is not. Apparently, the additional 13-feet of right-of-way "crosses the line" into the realm of an uncompensated "taking" under the 5th Amendment and Art.1, Sec. 22 of the Utah Constitution. BAM's position is not supported by takings case law and is fundamentally arbitrary and illogical.

More importantly, the County's requirement that BAM dedicate a portion of its property for highway right-of-way as a condition of development approval was the result of a general legislative prescription, not an individualized adjudicative decision. Together with the *amicus curiae*, BAM argues that the County's imposition of the highway dedication was applied as an

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[2]*See, B.A.M. Development v. Salt Lake County*, 87 P.3d 710, 2004 UT App 34, ¶2 (Utah App. 2004). Also see the "Findings of Fact" entered by the trial court [R. 266 - 269] at ¶¶ 6 - 10. The trial court's factual findings are not challenged on appeal by either party.

[3] *Id.*.

"administrative" condition of the subdivision approval[4]. This contention is fundamentally flawed. Although the dedication was *applied* at the administrative level, it was not an *ad hoc* "adjudicative" condition imposed by a County department; rather it was the product of uniform transportation standards imposed by *legislative* enactment. This distinction is crucial to the Supreme Court's resolution of this case.

While an *individualized* (*i.e.*, *ad hoc*) development exaction should indeed require an *individualized* determination of the relationship between the exaction and the impact which the exaction seeks to remedy, the dedication of highway right-of-way simply cannot be held to the *Dolan* "individualized determination" of "rough proportionality" test because the highway dedication requirement is fundamentally uniform and formulaic, not individualized, in its operation. In other words, it applies uniformly to any developer whose property abuts a highway affected by the County's transportation master plan. Thus, BAM's *Dolan* argument attempts to force a square factual peg into a round analytical hole.

This "legislative vs. adjudicative" issue is the threshold question here. For instance, when local building approvals are requested by developers, exactions are sometimes established *ad hoc* based on unique characteristics of the development proposal or the land on which it will be located. Thus, in *Nollan*, a public pedestrian walkway was imposed on the owner of private

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[4]*See*, Amicus Curiae Brief of the Utah State Property Rights Ombudsman at pp. 6 - 9. *See also*, BAM Op. Brief, pp. 34 - 42. There, BAM reverts to its original arguments in the trial court that the highway dedication violates equal protection and uniform operation of law protections. However, the trial court denied relief on these grounds, and these are not questions on which the Supreme Court has granted review here by certiorari.

beach property simply to connect two adjacent areas of public beaches[5]. The Coastal Commission found that the house which the plaintiffs proposed to build would block visual access to the beach and create a "psychological barrier" to its use by the public. This exaction clearly was tailored to the unique characteristics of the owner's property (*i.e.*, blocking public view and beach access). Courts categorize such exactions as "adjudicative" local government decisions because they arise on an individualized (and frequently negotiated) basis, and are not the result of a general, universally-applied legislative regulations.

Here, however, there was nothing about the unique characteristics of BAM's property that triggered the highway dedication. The dedication was based solely upon the fact that BAM's property shared a boundary line with a public highway – a fact that BAM knew when it acquired the property. It was not the size, shape, topography, geologic or environmental condition, visual impact, or any other unique characteristic of BAM's property which triggered the dedication requirement. Hence, the dedication was "legislative" rather than "adjudicative."

The distinction between a "legislative" mandate and an "adjudicative" development condition is at the heart of this appeal. However, BAM's Opening Brief fails to address this issue at all. BAM seemingly avoids this critical distinction simply by insisting repeatedly (and without authority) that *Dolan*'s "individualized determination -rough proportionality" test must apply to *any* development exaction, regardless of its kind or quality[6]. Yet BAM did not assert

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[5]*Nollan v. California Coastal Comm'n*, 483 U.S. 825,841-842 (1987)

[6]The *amicus* does, at least, address this distinction. He contends, however, that this case is distinguishable from the "legislative vs. adjudicative" cases cited in the County's

this stringent constitutional demand when the dedication requirement was only 40-feet, instead of 53-feet. BAM fails to explain how or why the additional 13-feet of required right-of-way dedication elevated this case to constitutional dimensions. Again, BAM focuses erroneously upon the degree (*i.e.*, quantity) of the dedication, rather than its underlying source and character (*i.e.*, legislative).

The highway-dedication ordinance at issue here, involves a *generally applicable* legislative assessment (or "exaction"), not one which is imposed – or which can be imposed – *individually*. As with any developer who chooses to develop a parcel which abuts a highway, BAM was required here to comply with a uniform legislative scheme which expects all similarly situated developers[7] to dedicate highway rights-of-way consistent with current uniform road-width standards. Such a uniform scheme is fundamental to ensuring that community development occurs in accordance with sensible long-range transportation planning. Otherwise, under BAM's view of the law, road-width requirements for new construction along major traffic corridors would vary radically from parcel-to-parcel, depending on the size, usage, and

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opening brief (*q.v.*, at pp. 20 - 32) inasmuch as the latter cases "involv[ed] imposition of a general scheme of fees or regulations on development that are similar to general applications of local governmental police power," and not the "forced physical occupation of private property as a condition of development." Amicus Brief, pp. 8 - 9. In this regard, the *amicus* is correct. However, like BAM, the *amicus* does not cite any cases arising from highway right-of-way dedication statutes or ordinances, which further suggests that this issue – presented in this particular context – is a matter of first impression.

[7]"Similarly situated" developers are those who, like BAM, develop property which abuts a major or secondary highway. *See* County Code of Ordinances, Sec. 15.28.010

other impact characteristics of each individual parcel. In practical effect, an "individualized" impact analysis would require a different road-width dedication for every single parcel located along the side of a highway. Rather than having roadways with even and consistent widths, road boundaries would be required to jut in and out in front of each abutting parcel, as dictated by an "individualized determination" of each parcel's traffic impact. The absurd practical consequences of this application of *Dolan* "rough proportionality" in such a case are obvious.

The exaction in this case then, is not an "*ad hoc*" discretionary assessment imposed on an *individualized* basis at the whim of some bureaucrat, or based on unique impact factors attributable exclusively to BAM's particular development. Rather, as the trial court concluded, the County highway-dedication ordinance

> "imposes the requirement of dedication on a broad class of property owners who choose to develop property which abuts a major or secondary highway [and] the assessment of how much property had to dedicated was not individualized, but rather was made pursuant to the generally applicable County Transportation Master Plan and applied across the board to all owners whose property abutted 3500 South."

Memorandum Decision, p. 3 [R. 249]. As such, it should be accorded deferential scrutiny on review and upheld so long as it "advances a legitimate governmental interests."

The County acknowledges that the *Nollan* "essential nexus" test is a valid requirement for constitutional analysis of a development exaction[8]. While the Court of Appeals' dissenting opinion found that the County's highway dedication ordinance passed the "essential nexus"

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[8]While the *Nollan* court devised the phrase "essential nexus" to distinguish its takings analysis from the "rational relationship"test evolved in its line of equal protection decisions, the phrases are functionally indistinguishable.

test[9], the majority made no such direct finding, but held that *Nollan* and *Dolan* together provide the standard to be applied by the County "reviewing body" to which the case was to be remanded[10]. Thus, while an essential nexus should exist between a governmental interest and the nature of the development exaction which a political subdivision seeks to impose, it does not necessarily follow that the individualized "rough proportionality" requirement of *Dolan* must apply. BAM has not demonstrated a reasoned basis or legal authority for holding otherwise[11]. While the *amicus* points out that the cases cited by the County's Opening Brief[12] do not involve the "forced physical occupation of private property as a condition of development,"[13] and while it is generally true that a physical occupation or invasion of property subjects an exaction to elevated takings scrutiny, neither the *amicus* nor BAM have provided any authority or argument that these cases should not apply here. The exactions upheld in these cases as "legislative" in character, rather than "adjudicative" – and therefore not subject to Dolan's "individualized determination - rough proportionality" analysis – generally involve payment of impact fees or similar economic assessment. However, these cases focus on the

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[9] *BAM Development, LLC v. Salt Lake County*, 87 P.3d 710, 729-730, 2004 UT App 34 ¶¶58 -62.

[10] *Id.*, at ¶ 16.

[11] BAM's Opening Brief does not respond to the line of cases offered by the County which examined the "legislative vs. adjudicative" character of various exactions and declined to hold that they amounted to a "taking."

[12] *Q.q.v.*, at pp. 20 - 33, and n.11.

[13] Amicus Brief, p. 8 - 9.

character of the exaction as a legislatively uniform requirement, not whether the exaction deprived the landowner of money, as opposed to land.

In short, neither BAM nor the *amicus* has established a sound legal basis for disregarding the "legislative vs. adjudicative" distinction here. This is not a case in which the County exercised *ad hoc* adjudicative discretion in response to the site-specific characteristics of BAM's land as occurred in *Nollan* and *Dolan*. As the Arizona Supreme Court held in *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997),

> "[the *Dolan* court] was careful to point out that a city's *adjudicative* decision to impose a condition tailored to the particular circumstances of an individual case," [but] "[b]ecause the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals [below] thought *Dolan* did not apply. We agree, though the question has not been settled by the [United States] Supreme Court."

This issue may yet be decided by the U.S. Supreme Court. In the meantime, the trend in lower courts appears to favor recognition of the legislative vs. adjudicative dichotomy where, as here, an exaction follows a uniform legislative formula. This rationale operates independently of whether the exaction takes the form of land or money. The result should be that only the *Nollan* prong of the so-called "*Nollan/Dolan*" analysis should be applied while the *Dolan* prong should be reserved for discretionary "adjudicative" land-use decisions by government. And, even Judge Orme's dissenting opinion in the Court of Appeals decision, which would have ruled for BAM, acknowledges that the *Nollan* "essential nexus" test is

satisfied in this case[14]. Accordingly, this court should find that (a) the "essential nexus" test of *Nollan* must be, and here has been, met; and (b) the *Dolan* "individualized determination- rough proportionality" test does not apply to the uniform legislative scheme embodied by the County's highway-dedication ordinance.

2

The Court of Appeals correctly held that the district court's review is generally limited to the administrative record pursuant to Utah Code Ann., Sec. 17-27-1001.

The *amicus* offers an impassioned argument for reversal of the "administrative hearing and record" requirement of the Court of Appeals decision[15]. His argument focuses chiefly upon the practical impact of repetitive administrative proceedings and resulting "cost, delay and hassle" for citizens.

The Court of Appeals' decision effectively remands this litigation to the County administrative process to conduct a formal evidentiary hearing on BAM's administrative appeal, and to create a record thereof. The County maintains that the Court of Appeals' majority analysis of Utah Code, Sec. 17-27-1001 as requiring a county or municipality to conduct appropriate hearing and recordmaking in appeals of certain land use decisions is a reasonable interpretation of the statute. However, as discussed in Argument 3, *infra*, this holding only

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[14]*B.A.M. Development LLC v. Salt Lake County, supra*, 87 P.3d at 730-731, 2005 UT App 23 at ¶62.

[15]*See, e.g.*, Amicus Brief, pp. 16 - 21. BAM's opening brief, on the other hand, does not substantively address the "administrative remand" issue at all.

applies in appeals which – unlike this one – are not asserted as a "constitutional takings issue" under Utah Code, Sec. 63-90a-41.

In such cases, the decision below simply requires that a County must provide an opportunity for a full evidentiary hearing to be conducted, and a record thereof to be created. In accordance with Sec. 27-17-1001 and, by analogy to Sec. 17-27-708, the Court of Appeals reasoned that the district court's review is limited to a review of the official administrative record generated before the appropriate county hearing officer or panel. This interpretation of Sec. 1001 will actually reduce the delays and expenses of traditional litigation, redundant or inconsistent adjudicative proceedings. The requirement of an administrative hearing and record also allows a county or municipality to review the rationale of its own agency decisions where contested by an affected citizen. Thus, the "administrative hearing and recordmaking" requirement read into Sec. 1001 by the Court of Appeals promote sound public policy and judicial economy. If properly implemented, this requirement will provide for a single recorded land-use administrative appeal hearing, and will actually avoid repetitive, time-consuming and costly administrative reviews.

However, as discussed in the County's Opening Brief[16], the Court of Appeals' decision is valid as far as it goes, but does not apply to this case because Utah statute carves out a specific exception – effectively providing for a direct action in the district court – for those challenges asserted as "constitutional takings issues" under Sec. 63-90a-4.

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[16]County's Opening Brief at 38 - 40.

3

Section 63-90a-4 of the Utah Code permits filing of an action on a "constitutional taking issue"regardless of the state of the administrative record.

BAM correctly argues that the Court of Appeals' decision "overlooked" the application of Sec. 63-90a-4 to this case[17]. It is true that the Court of Appeals did not discuss the application of Sec. 63-90a-4. However, this is because BAM never raised this issue in the Court of Appeals. Thus, the County objects to Supreme Court consideration of this issue on the ground that the issue was Sec. 63-90a-4 was not properly preserved below. BAM argues that application of Sec. 63-90a-4 arose from the Court of Appeals' decision which developed the "administrative hearing and record" issue *sua sponte*, not at the suggestion of either party. However, BAM then erroneously states that

> "[e]ven when the obvious applicability of Section 63-90a-4 was brought to the Court of Appeals' attention (in the context of the 'petition for rehearing'), the Court of Appeals ultimately declined to consider the same."

BAM Op. Brief at 46. Thus, BAM implies that it raised Sec. 63-90a-4 in its Petition for

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[17]BAM Op. Brief, p. 46. BAM scolds the County for "changing its tune" with respect to the applicability of Sec. 63-90a-4 to this case between its petition for Writ of Certiorari and its Opening Brief *Id.*, p. 46, n. 6. The County apologizes for any confusion on this issue. However, after further research and analysis, it appeared that Sec. 63-90a-4 would indeed apply to BAM's "constitutional takings" claim, thereby exempting BAM from the usual administrative appeal and exhaustion requirements – *if* BAM had properly presented this issue on appeal. That said, the County still maintains (as its response to BAM's petition for certiorari is quoted by BAM) that "there is actually no 'conflict' at all between Sec. 63-90a-4, and the interpretation of Sec. 17-27-2001 given by the Court of Appeals." Indeed, there is no "conflict" because these statutes apply to two different classes of land-use appeals: the first, to "constitutional takings issues," the latter, to appeals of all other land-use decisions.

Rehearing filed in the Court of Appeals on March 5, 2004. In actuality, BAM never mentioned Sec. 63-90a-4 in its Petition for Rehearing. In twenty-three pages of argument for rehearing, BAM exhaustively reargued its case, but nowhere did it invoke the provisions of Sec. 63-90a-4. Thus, BAM should be precluded from raising the issue of Sec. 63-90a-4 first the first time in this court.

However, if the Supreme Court chooses to consider this issue on its merits notwithstanding the lack of preservation below, it appears that Sec. 63-90a-4 applies to this case. That statute, entitled "Constitutional Taking Issues," provides that political subdivisions are required to adopt the type of administrative review of constitutional takings claims contemplated by the County's "takings relief" ordinance discussed in the County's Opening Brief. *See*, Utah Code Ann. Sec. 63-90a-3. The County's takings relief procedure provides a method by which an aggrieved citizen may seek plenary judicial review of a constitutional takings claim. Then, Sec. 63-90a-4 allows to a citizen to seek judicial relief while bypassing the political subdivision's administrative takings relief review provided as an option by the statute. So long as a property owner denominates his or her objection to a county or municipal land-use decision as a "constitutional taking issue, " the claim may bypass the administrative process and be filed directly in district court. Accordingly, subject to the preservation objection discussed above, the County acknowledges that inasmuch as BAM's claim was asserted as a "constitutional taking issue," it was properly heard and decided in the district court.

CONCLUSION

The highway dedication ordinance in this case, which involves a uniform and comprehensive "legislative"scheme, presents what appears to be a constitutional issue of first impression to this court. The "takings" analysis requiring an "individualized determination" of "rough proportionality" developed in the U.S. Supreme Court's *Dolan* decision is not applicable in this case. The *Dolan* "rough proportionality" standard does not apply to a generally-applied legislative land-use scheme, as occurred here. The County ordinance at issue here applied equally and even-handedly to developers of all highway-abutting land, and was not the product of an "*ad hoc*" individualized discretionary (*i.e.*, "adjudicative") act. Therefore, while the ordinance should – and does – satisfy the "essential nexus" test of *Nollan*, it is not subject to the *Dolan* "rough proportionality" test. Even the dissenting opinion in the Court of Appeals decision, which would have ruled for BAM, acknowledges that the "essential nexus" test is satisfied in this case.

Although the Court of Appeals properly interpreted Sec. 17-27-1001 as limiting district court review of a land use decision appeal to the administrative record, this limitation does not apply to appeals involving a "constitutional takings issue," as this case does, pursuant to the provisions of Sec. 63-90a-4. Thus, routine land use appeals which do not present constitutional takings issues should be subject to the "administrative hearing and record" requirement established by the Court of Appeals as a prerequisite to district court review. However, this case *does* raise a constitutional takings issue. Accordingly, if the Supreme Court elects to

consider Sec. 63-90a-4, even though it has never been raised below, then this action was properly brought and tried in the district.

Accordingly, the County respectfully submits that this court should find that (a) the "essential nexus" test of *Nollan* must be, and here has been, met; and (b) the *Dolan* "individualized determination- rough proportionality" test does not apply to the uniform legislative scheme embodied by the County's highway-dedication ordinance.

DATED this 21st day of February, 2005.

DAVID E. YOCOM
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By:

DONALD H. HANSEN
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* * * * *

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY BRIEF OF PETITIONER AND CROSS-RESPONDENT SALT LAKE COUNTY** was mailed by U.S. First Class Mail, postage prepaid (2 copies each) to:

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On this 22 day of February, 2005.